TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1134.

THE ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, APPELLANT,

vs.

THE TOWN OF MIDDLEPORT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 8, 1887.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 18, 1887.

1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, judge of the district court of the United States for said northern district of Illinois, on Tuesday, the fifth day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and eighty-seven, and of our Independence the one hundred and twelfth year.

WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

ÆTNA LIFE INSURANCE COMPANY,
vs.
THE TOWN OF MIDDLEPORT *et al.* } In Chancery.

Be it remembered that on the twenty-seventh day of May, 1886, came the complainant, by its solicitors, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, its bond for costs and bill of complaint in said above-entitled cause, which said bond and bill are respectively in the words and figures following, to wit:

2 *Bond for Costs.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Circuit Court United States of America. May Term, A. D. 1886.
In Equity.

THE ÆTNA LIFE INSURANCE COMPANY
vs.
THE TOWN OF MIDDLEPORT *et al.*

I do hereby enter myself security for costs in this cause and acknowledge myself bound to pay or cause to be paid all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State and of the United States.

Dated this 24 day of May, 1886.

O. J. BAILEY.

Endorsed: Filed May 27, 1886. Wm. H. Bradley, clerk.

3 In Circuit Court. May Term, A. D. 1886.

UNITED STATES OF ANERICA, *Northern Dist. of Illinois,* } *ss:*

To the honorable the judges of the circuit court of the United States for the northern district of Illinois:

The Ætna Life Insurance Company, a corporation constituted by the laws of the State of Connecticut and having its office and prin-

cipal place of business at Hartford, in said State, and a citizen of said State, brings this its bill in equity against the town of Middleport, a municipal corporation under the laws of the State of Illinois, situated in the county of Iroquois, in said northern district, and a citizen of said State of Illinois, and against the Chicago, Danville & Vincennes Railroad Company, a corporation under the laws of Illinois and a citizen thereof.

And thereupon your orator showeth to your honors:

That in the year 1865 the said Chicago, Danville & Vincennes Railroad Company was incorporated under the laws of the State of Illinois with power to construct a railroad in said State from a point in Lawrence county by way of Danville to the city of Chicago. For more full information as to the powers and duties of the said railroad company, and as to the location and objects thereof your orator refers your honors to the act of incorporation in the Private Laws of Illinois for 1865, volume 2, page 140.

For the purpose of aiding said company in the construction of its railroad the Legislature of Illinois, on the 7th day of March, 1867, passed an act, entitled "An act to authorize cities, towns, or townships lying within certain limits, to appropriate moneys and levy a tax to aid the construction of the Chicago, Danville & Vincennes railroad, approved March 7, 1867," to which act, as recorded in the Private Laws of Illinois for 1867, volume 1, page 842, reference may be had.

Your orator avers that said act authorized all incorporated towns and cities and towns acting under township organization lying wholly or in part within twenty miles of the east line of the State of Illinois, and also between the city of Chicago and the southern boundary of Lawrence county, in said State, to appropriate such sums of money as they should deem proper to the said Chicago, Danville & Vincennes Railroad Company, to aid it in the construction of its road, to be paid as soon as the track of said road should be laid and constructed through such cities, towns, or townships:

Provided, however, that a proposition to make such appro-
4 priation should first be submitted to a vote of the legal voters of such cities, towns, or townships at a regular, annual, or special meeting of which at least ten days' previous notice should be given, and also provided that a vote should be taken on such proposition, by ballot, at the usual place of election, and that a majority of the votes cast should be in favor of the proposition; and your orator further avers that said act authorized and required the authorities of such cities, towns, and townships to levy and collect such taxes and to make such other provisions as might be necessary and proper for the prompt payment of such appropriations so made.

And your orator showeth to your honors that in and during the years 1867 and 1868 the town of Middleport, in said county of Iroquois, was acting under township organization, pursuant to the laws of Illinois, and was within the limits named in said act, lying, as it did, wholly or in part within twenty miles of the east line of the State of Illinois, and also between the city of Chicago and the south-

ern boundary of Lawrence county, before named, and so was duly authorized by said act to make appropriations to said railroad company, in the mode prescribed in said act, to aid it in the construction of its road, and that the authorities of said town were both authorized and required to levy and collect such taxes and to make such other provisions as might be necessary and proper for the prompt payment of such appropriations.

And now your orator showeth to your honors that on the 8th day of June, 1867, in pursuance of a legal, written notice, duly published according to law not less than ten days previously, a legal special meeting of the legal voters of said town of Middleport was held at the usual place of holding elections in said town, and that said meeting being duly organized said voters proceeded to cast their votes, by ballot, for and against the proposition to levy and collect a tax of fifteen thousand dollars upon the taxable property of the inhabitants of said town to aid in the construction of said railroad: provided Watseka, a city in said county of Iroquois, situated in or near the south line of said town, should be made a point in said road. And your orator saith that the said votes so cast being duly canvassed and counted it appeared that two hundred and thirty-three of them were in favor of such tax and that sixty-eight of them were against it, and that thereupon the proposition to levy and collect such tax was duly declared carried and the proceedings at and relating to said meeting and said vote were duly attested by the town clerk of said town and by the moderator of said meeting and, as so attested, were by said town clerk duly recorded on the records of said town.

And your orator saith that by the enactments of the Legislature of Illinois, above cited, said voters were empowered to bind the said town of Middleport by said vote, and that said town thereby, then and there, became bound to levy and collect the tax so voted, as soon as said road should be laid out and constructed through said town, provided said city of Watseka should be made a point in said road, and therewith to pay over to the said railroad company the said sum of fifteen thousand dollars so appropriated by said town to said company under the authority of the said enactments.

And your orator saith that the said appropriation so made was, at or about the time of making the same, entered and recorded by the supervisor of said town upon a book kept for that purpose by the said railroad company to the intent that the said company should have due knowledge and evidence of such appropriation and be bound on its part to fulfil the conditions upon which such appropriation was made.

And your orator further saith that the vote and proceedings aforesaid and the said records thereof constituted a valid, legal contract in writing, whereby, upon fulfillment by said company of the conditions thereof, said town was bound to pay said appropriation to said company and to levy and collect such taxes and to make such provisions as were necessary and proper for the prompt payment of

the same, as authorized and required by the said act passed March 7, 1867, above referred to.

Your orator saith that the said railroad company had full knowledge of the said proceedings, vote, and appropriation, and of the conditions thereof, assented thereto and complied with the conditions prescribed in said act of March 7, 1867, and with the conditions prescribed or implied in said vote made said city of Watseka a point in said railroad, and relying on said appropriation and on the good faith of said town of Middleport in keeping its obligations under said vote, on or about the — day of July, 1871, had laid, constructed, and completed its railroad through the said town of Middleport; and your orator avers that so the said conditional contract, making the said appropriation of $15,000, became an absolute contract on the part of said town, whereby said town became bound to levy and collect such taxes and to make such provisions as were necessary and proper for the prompt payment of the said appropriation, according to the true intent and meaning of the said act of March 7, 1867, and of the said vote passed under the authority thereof.

And your orator further showeth to your honors that subsequently to the passage of the said act of March 7, 1867, and before the laying and construction of the said railroad track by the said railroad company, to wit, on the 26th day of February, 1869, for the purpose of confirming and legalizing appropriations to said company, made by municipal corporations under the authority of the act of March 7, 1867, before named, and for the purpose of enabling such corporations the better to pay such appropriations, the Legislature
6 of Illinois passed another act, entitled "An act to legalize certain aids heretofore voted and granted, to aid in the construction of the Chicago, Danville & Vincennes railroad," approved February 26, 1869, to which act, as published in the Private Laws of Illinois for 1869, volume 3, page 355, reference may be had; and also that, on the 24th day of March, 1869, the said Legislature, for the like purpose, passed another act entitled "An act to enable towns, townships, cities, or counties along the line of the Chicago, Danville & Vincennes railroad to contribute toward the construction of said railroad," approved March 24, 1869, to which act, as recorded in the Private Laws of Illinois for 1869, volume 3, page 356, reference may be had.

And your orator saith that the said railroad company, relying on the provisions of the act of March 7, 1867, and upon the vote and acts of the said town of Middleport and of its authorities, officers, and agents under the same, and also relying upon the said acts passed in 1869, accepted the conditions of the said appropriation made to it by said town of Middleport, and, on the faith thereof, laid, constructed, and completed its track through said town.

And your orator further showeth to your honors that on the 10th day of February, 1871, the board of town auditors of the said town of Middleport met, according to law, and adopted the following resolution, to wit:

"Whereas the township of Middleport did, on the 8th day of June,

1867, vote aid to the Chicago, Danville & Vincennes Railroad Company to the amount of fifteen thousand dollars, and it appearing that said township is unable to pay such amount in money:

"Therefore resolved by the board of auditors of said township that bonds issue to said Chicago, Danville & Vincennes Railroad Company to the amount of fifteen thousand dollars, together with a sufficient amount to cover the discount necessary on said bonds in negotiating the same, to wit, one thousand five hundred dollars, said bonds to be dated February 20th, A. D. 1871, and to bear interest at the rate of ten per cent. from date per annum.

And your orator saith that said resolution was duly recorded on the records of said town of Middleport.

And your orator further showeth that, on the 24th day of March, A. D. 1871, in pursuance of the said resolution, the supervisor and town clerk of the said town of Middleport executed fifteen one thousand dollar bonds of said town, dated the said last-mentioned day, payable June 1st—three of them in 1876, three in 1877, three in 1878, four in 1879, and two in 1880, all bearing interest at
7 the rate of ten per cent. per annum, payable on the first day of June, in each year, as per interest coupons thereto attached. A copy of one of said bonds, indorsed by the auditor of the State of Illinois, as registered in his office, is hereto annexed, marked Exhibit A, and made part of this bill.

The said bonds were numbered one to fifteen, inclusive, and were delivered to the said railroad company, upon the fulfillment of the conditions of said vote, in payment of ninety cents on the dollar of the appropriation made to said company by said vote, both parties believing that said bonds were fully authorized by law and were legal, valid, and binding on said town, and also believing them to be legal evidences of the debt in favor of said company incurred by said town in voting said appropriation.

And your orator further showeth that on the 1st day of April, 1871, the said board of auditors again convened according to law and adopted the following preamble and resolution, to wit:

"Whereas the township of Middleport did, on the 8th day of June, A. D. 1867, vote aid to the Chicago, Danville & Vincennes Railroad Company to the amount of one thousand five hundred dollars," evidently meaning fifteen thousand dollars, "and it appearing that bonds to said amount have been duly issued, which said bonds were sold to said company at ninety cents on the dollar ($1.00), and it further appearing that a sufficient tax has been levied and collected to pay to said company the amount of discount, to wit, one thousand five hundred dollars, which amount is now held by the supervisor of said township:

"Therefore resolved, That this board do hereby instruct the said supervisor to pay over to the said Chicago, Danville & Vincennes Railroad Company or their legal representatives the amount of one thousand five hundred dollars, in lieu of bonds to that amount, the same to become due and payable when the said railroad has been completed to Watseka."

And your orator saith that the said resolution was adopted by the

said board of auditors, in passing upon the accounts of the supervisor of said town, at their regular meeting for such purpose, according to the statutes of Illinois, and that said preamble and resolution were duly recorded on the records of said town.

And your orator further showeth that the said town of Middleport has repeatedly recognized and affirmed the validity of said bonds and its obligation to levy and collect taxes for the amounts specified therein, by paying the annual interest on said bonds, as specified in the coupons thereto annexed, up to and including the interest due July 1st, 1876.

8 And your orator saith that the said Chicago, Danville & Vincennes Railroad Company, no part of said appropriation having been paid, accepted said bonds in good faith as evidence of the debt incurred by said town of Middleport by voting in favor of said appropriation, and also, believing that the said bonds represented said debt, so modified that it was payable in time and with interest according to the apparent tenor and effect of the said bonds, and also accepted said bonds as negotiable securities duly authorized by said town of Middleport, constituting, in themselves, legal choses in action against said town in the hands of the bearer or of any person or persons to whom they should have been transferred in good faith, either by endorsement or delivery.

And so believing, the said railroad company, on or about the — day of ——, 1871, put the said bonds upon the market for sale in order to raise the money necessary for the payment of the appropriation made to it by the said town of Middleport, believing that the purchasers of said bonds would by the purchase of the same be substituted to all their rights of action against said town by reason of the premises, according to the tenor and effect of said bonds, as good and valid negotiable instruments, and that if for any cause said bonds should prove not to be valid as negotiable instruments, constituting in themselves good causes of action, that they were, at least, evidences of debt, entitling the purchasers and holders thereof to recover of said town of Middleport the several amounts named in them, with the lawful interest thereon, according to their tenor, and so believing said railroad company, by means of their agents, servants, or assigns, sold the said bonds in the market.

And your orator saith that on or about the — day of July, 1871, your orator, in like manner believing that said bonds were evidences of debt against said town, representing said appropriation, and were good and valid negotiable instruments, entitling the holder to recover of said town the moneys therein specified, according to the apparent tenor and effect of said bonds, purchased the same in the market and paid therefor the sum of fourteen thousand seven hundred ($14,700) dollars, which moneys came to the use of the said railroad company, or of its assigns, in satisfaction of all claims which said company, or its assigns, had against the said town by reason of said appropriation or of said bonds to the extent represented or intended to be represented by said bonds and as the consideration of the assignment of such claims to your orator.

And your orator saith that the intent and purpose of the said rail-

road company, its agents, servants, or assigns, in selling and delivering to your orator the said bonds, and in receiving the said money therefor, was to subrogate your orator to all rights which said company had against the said town of Middleport by reason of said bonds or by reason of the said appropriation to the extent repre-
9 sented or intended to be represented by said bonds, and that the intent and purpose of your orator in purchasing said bonds and paying its money therefor was to acquire such rights and to be subrogated thereto.

And your orator avers that by reason of the facts herein alleged your orator was, in equity, subrogated to said rights, and is entitled to enforce the same against said town of Middleport, by exhibiting this its bill in equity against said town to this honorable court, and that said town, by its acts and votes herein recited, and by paying to your orator the interest on said bonds, and levying and collecting taxes therefor, admitted the subrogation of your orator to such rights and the title of your orator to enforce such rights against said town, and is forever estopped from denying the same.

And your orator further saith that up to the first day of July, 1876, to which date the said town paid the interest on said bonds, your orator had no knowledge, information, or belief that said town claimed that said bonds or that said appropriation were not legal and valid and binding on said town.

And now your orator showeth to your honors that on or about the 26th day of June, 1876, the said town of Middleport, then in the full enjoyment of the benefits of said appropriation, having received the full consideration therefor, notwithstanding its acts and votes aforesaid, exhibited its bill in equity to the judges of the honorable circuit court for the county of Iroquois aforesaid against your orater as the holder of said bonds, so called, and against certain other persons whom it is not material to name, alleging, in substance, the making and issuing of said bonds, as herein stated, that the same were delivered to your orator, that your orator was the holder thereof, and that the same were made and issued without authority of law and were invalid, and praying the court so to decree and to enjoin your orator from collecting the same and for other relief, as by the record in the cause, upon reference thereto, will fully appear.

The circuit court, to which said bill was exhibited, dismissed the same, and thereupon the said town appealed from the decree of dismissal to the honorable the supreme court for the northern grand division of Illinois, the court of highest and ultimate jurisdiction in said State, which court, at a term thereof holden on the 12th day of September, 1876, reversed said decree, held that said bonds were void as issued without authority of law, and remanded the cause to the said circuit court for further proceedings. Whereupon the said circuit court passed a decree in conformity with the opinion of the said supreme court, adjudging the said bonds void, as having been made and issued without authority of law, and enjoined your orator from collecting the same.

10 For the better information of your honors your orator refers to the bill and decree in said cause, and also refers to

the opinion of the said Supreme Court in the Town of Middleport *vs.* The Ætna Life Insurance Company and others, reported in the Reports of Legal Decisions for the State of Illinois, volume 82.

Your orator saith that while the said supreme court held and the said circuit court adjudged that the said bonds were made and issued without authority of law, and that, therefore, no action could be sustained on them as negotiable instruments in the hands of *bona fide* holders for value, neither of said courts held or adjudged that the said appropriation of money, voted by the said town of Middleport to said railroad company was not good and valid in law and did not constitute a good cause of action, which said company and your orator, subrogated to the rights of said company, could enforce against said town of Middleport.

Your orators submit to your honors that, on the contrary, said courts impliedly admit the validity of said appropriation, since they limit their opinion and judgment to the question of the validity of the bonds, and merely decide that as such they were issued without authority of law, so that neither the said railroad company nor any person claiming through them could maintain an action on them. The said bill contained allegations to the effect that said appropriation was void because the said railroad company had not completed its road before the time when the provisions of the constitution of Illinois prohibiting such appropriation went into effect; but said courts did not so decide, but simply decided that the bonds were void as made, and issued without authority of law.

Your orator avers that by the issue and delivery of said bonds to the said railroad company, ratified and confirmed by the resolutions, votes, and acts of said town and its officers, herein set forth, and by the acceptance of said bonds by said railroad company, the obligation incurred by the town of Middleport, in making said appropriation was so modified that said appropriation, instead of being payable upon the completion of said road through the town, became payable in time, with interest, as provided in said bonds; and your orator avers that the said bonds were and are evidences of debt, so payable, and your orator saith that, although said courts decided that said bonds as bonds, constituting in themselves causes of action, were void, as having been made and issued without authority of law, they did not decide that they were not legal evidences of debt, payable with interest as therein specified.

And your orator, upon information and belief, saith that the said town of Middleport pretends, and will claim before the court upon the trial of this cause, that by said decree of the circuit court
11 of Iroquois county, all the matters herein alleged as constituting rights of action against it have been adjudicated so that your orator is estopped from asserting them again, but your orator alleges and shows to your honors that such pretence is unfounded, and that all such matters remain open and unaffected by said decree.

And your orator avers that by the issue, delivery, and acceptance of said bonds in manner aforesaid the obligation incurred by said town of Middleport in making said appropriation was so modified

that said appropriation, instead of being payable on the completion of said road through the town, became payable on time, with interest, in manner specified in said bonds, and further saith that if it was not so modified that then in that case said appropriation remained unaffected and unimpaired by reason of said bonds, so that said company had the right to recover the same of said town, such issue, delivery, and acceptance, notwithstanding, together with lawful interest for the detention thereof, and your orator saith that in either case your orator, by reason of the facts herein alleged, was subrogated to all the rights which the said railroad company had against the said town of Middleport, which voted said appropriation.

And your orator further saith that no part of the principal sum named in said bonds and no part of said appropriation has ever been paid, but that, on the contrary, the said town of Middleport, whose duty it became to pay the same, denies all liability therefor, and unjustly detains from your orator the moneys due thereon; and your orator avers that by reason of such unjust detention the said town is liable in law and equity to pay interest as damages for such unjust detention.

Ever since the purchase of said bonds as aforesaid your orator has continued to hold and now holds the same, and has been and now is the holder of all the rights which the said railroad company or its assigns had against the said town by reason of the premises.

Your orator therefore prays your honors by proper orders and decrees to declare your orator subrogated to all the rights of said railroad company or of its assigns, against said town by reason of the premises to ascertain the amount due by reason of the facts herein alleged and the interest which has thereon accrued, either as interest or as damages for the delay of payment, and to adjudge and decree that the town of Middleport shall pay to your orator the amount so found due, and shall without delay levy and collect all taxes necessary for such payment, together with the costs of this proceeding, and in ascertaining the amount due, in case your honors shall be of opinion that the obligation incurred by said appropriation was modified by
12 the issue, delivery, and acceptance of said bonds, as herein alleged, then and in that case to find that said amount is the principal sum of fifteen thousand ($15,000) dollars named in said bonds, and the interest thereon, according to the tenor of said bonds less the interest paid as aforesaid up to July 1st, 1876; but in case your honors shall be of opinion that said obligation was not so modified, then and in that case to find that the amount which the said town of Middleport shall pay to your orator is the amount of said appropriation, to wit, the sum of fifteen thousand dollars, and the lawful interest thereon for the detention of the debt.

And your orator prays your honors to enforce the rights of your orator in the premises by writs of mandamus and by such other and further orders and decrees according to the course of equity as shall be necessary and proper to afford the relief herein prayed for, and to grant such other and further relief as shall be equitable, just, and proper, together with the costs of this proceeding.

Your orator saith, upon information and belief, that sometime after your orator purchased said bonds and became subrogated to the rights of the said Chicago, Danville & Vincennes Railroad Company, as herein alleged, but at what precise time your orator does not know, the said company became insolvent, and was by this honorable court placed in the hands of a receiver, to wit, W. H. Leyford, of ——, and your orator asks permission of this court to make said receiver as such also a party defendant hereto.

May it please your honors, the premises considered, to grant to your orator a writ of subpœna issuing out of this honorable court and under its seal, directed to said town of Middleport and to the said Chicago, Danville & Vincennes Railroad Company, also defendants herein, commanding them to appear and answer to this bill of complaint.

To the end, therefore, that the said town of Middleport may, if it can, show why your orator should not have the relief herein prayed for, your orator prays that the said defendant may full, distinct, and perfect answers make to all and singular the allegations in this bill contained, either admitting or denying the same, but not under oath, your orator hereby expressly waiving such oath, as by the rules of the court permitted, and that the other defendants may make such answers as they shall be advised to make.

THE ÆTNA LIFE INSURANCE COMPANY,
By its solicitors, BAILEY & SEDGWICK.

FRANCIS FELLOWES, *Of Counsel.*

13 EXHIBIT A.

UNITED STATES OF AMERICA, *State of Illinois:*

Middleport Township Railroad Bond.

No. —. $1,000.

Know all men by these presents that the township of Middleport, in the county of Iroquois and State of Illinois, acknowledges itself to owe and be indebted in the sum of one thousand dollars, lawful money of the United States of America, which sum of money the said township of Middleport promises to pay to the bearer at the American Exchange National Bank in New York on the first day of June, in the year one thousand eight hundred and seventy-eight, with interest thereon at the rate of ten per cent. per annum, which interest shall be payable yearly on the first day of June in each year at the American Exchange National Bank in New York, upon presentation and delivery of the warrants or coupons severally hereto annexed until the payment of the said principal sum.

This bond is issued under and by virtue of a law of the State of Illinois entitled "An act to authorize cities, towns, or townships lying within certain limits to appropriate moneys and levy a tax to aid the construction of the Chicago, Danville & Vincennes railroad," approved March 7, 1867; also and virtue of a law of said State entitled "An act to legalize certain aids heretofore voted and granted to

aid in the construction of the Chicago, Danville & Vincennes railroad," approved February 26, 1869; also an act approved March 24, 1869, to issue bonds in accordance with the vote of the electors of said township at a special election held on the eighth day of June, 1867, in accordance with said act, and the faith of said township of Middleport is hereby pledged for the payment of said principal sum and interest as aforesaid.

In witness whereof the supervisor and clerk of said township of Middleport have subscribed this bond this twenty-fourth day of March, one thousand eight hundred and seventy-one.

SYLVANUS C. MUNHALL, *Clerk.*

EZEKIEL B. SLEETH, *Supervisor.*

[Twenty-five revenue stamp in left-hand corner.]

AUDITOR'S OFFICE, SPRINGFIELD, *July* 6, 1871.

I, Charles E. Lippincott, auditor public accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of an act entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns," in force April 16, 1869.

In testimony whereof I have hereunto subscribed my name and affixed the seal of my office the day and year aforesaid,

C. E. LIPPINCOTT,
Auditor Public Accounts.

(Auditor's Office, Springfield.)

Endorsed: Filed May 27, 1886. Wm. H. Bradley, clerk.

14 On the same day, to wit: On the twenty-seventh day of May, 1886, there issued out of said clerk's office a writ of subpœna in said entitled cause, which said writ, together with the return of the marshal thereto attached, are in the words and figures following to wit:

Subpœna.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } ss:

The United States of America to the town of Middleport, Iroquois county, Illinois, the Chicago, Danville and Vincennes Railroad Company, and W. H. Leyford, receiver of said railroad company, Greeting:

We command you and every of you that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois at Chicago, in said district, on the first Monday in the month of July next, to answer the bill of complaint of the Ætna Life Insurance Company, a corporation, &c., this day filed in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made; upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

15 Witness, the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 27th day of May, in the year of our Lord one thousand eight hundred and eighty-six, and of our independence the 110th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Memorandum.

The above named defendants are notified that unless they and each of them shall enter their appearance in the clerk's office of said court at Chicago aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against them as confessed and a decree entered accordingly.

WM. H. BRADLEY, *Clerk.*

Marshal's Return.

I have duly served the annexed writ in the following, to wit:

Upon the town of Middleport, Iroquois county, Illinois, by personally delivering to J. S. Near, supervisor of said town, a true copy thereof, the ninth day of June, A. D. 1886. I also served the same upon W. H. Leyford, receiver of the Chicago, Danville and Vincennes Railroad Company, by personally delivering to him a

16 true copy thereof on the seventh day of June, A. D. 1886.

I also served the same upon the Chicago, Danville and Vincennes Railroad Company therein named by personally delivering to Joseph O. Rutter, a director of said company, a true copy thereof on the 11th day of June, A. D. 1886.

FREDERICK H. MARSH,
U. S. Marshal.
By WILL H. DUTCHER, *Deputy.*

Endorsed: Filed June 12, A. D. 1886. Wm. H. Bradley, clerk.

17 Afterwards, to wit, on the 7th day of July, 1886, came the town of Middleport, by its solicitor, and filed in said clerk's office its demurrer to the bill in said entitled cause; which said demurrer is in the words and figures following, to wit:

Demurrer.

In United States Circuit Court, Northern District of Illinois. July Term, 1886.

The demurrer of the Town of Middleport to the bill of complaint of the Ætna Life Insurance Company against the Town of Middleport and others.

This respondent, by protestation not confessing all or any of the matters or things in the complainant's bill of complaint contained to be true in manner and form as therein set forth, doth demur to said bill, and for cause thereof shows—

That said bill does not contain any matter of equity whereon this court can ground any decree or give complainant any relief as against this respondent.

Second. Bill shows it is exhibited against respondent and the Chicago, Danville and Vincennes Railroad Company and William Lyford, its receiver, as respondents thereto, and the facts set forth therein show the same relief cannot be granted against all of said
18 respondents, and fails to state facts showing respondents jointly liable, but stated facts which show this respondent, if liable at all, is not jointly liable or in any manner connected with the others, and the bill is multifarious.

Third. Fails to show any written agreement on which suit is brought that would bind respondent, and fails to state facts showing a cause of action exists against respondent that arose within five years last past before bringing of suit.

Fourth. Fails to show any written agreement on which suit is brought binding on respondent on which has arisen a cause of action within the last ten years prior to bringing this suit.

Fifth. Fails to set forth facts showing an excuse for the great delay in bringing suit which is shown on face of bill, and equity will not relieve against laches.

Sixth. Bill contains many blanks of dates and names and nothing on face of bill from which facts can be obtained to fill same.

Wherefore and for other good causes of demurrer on face of said bill this respondent demurs thereto and demands the judgment of this court whether it shall be compelled to make any further or other answer to said bill, and prays to be hence dismissed with its costs most wrongfully sustained.

TOWN OF MIDDLEPORT,
By ROBERT DOYLE,
Its Solicitor.

19 I certify that, in my opinion, the foregoing demurrer of the Town of Middleport to the bill of complaint of the Ætna Life Insurance Company, complainant, is well founded in law and proper to be filed in above cause.

ROBERT DOYLE,
Sol. for Town of Middleport.

UNITED STATES OF AMERICA,
Northern District of Ills., Iroquois County, } *ss:*

J. S. Near, supervisor of the Town of Middleport, one of the respondents, on oath states that he has heard read the foregoing demurrer to the bill of complaint of the Ætna Life Insurance Company in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

J. S. NEAR.

Subscribed and sworn to before me, a notary public of Iroquois

Co., Ills., by J. S. Near, the supervisor of the town of Middleport, this 5th day of July, A. D. 1886.

[SEAL] W. F. PIERSON,
Notary Public.

Endorsed: Filed July 7, 1886. Wm. H. Bradley, clerk.

20 Afterwards, to wit, on the thirteenth day of June, in the adjourned May term of said court, 1887, in the record of the proceedings thereof in said entitled cause before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

ÆTNA LIFE INSURANCE COMPANY
vs.
TOWN OF MIDDLEPORT *et al.* } In Chancery.

It appearing to the court that the defendant, Chicago, Danville and Vincennes Railroad Company has been served with process, but has not appeared herein, and it being now three times solemnly called in open court to appear and plead, answer, or demur to the complainant's bill, comes not, but makes default, it is thereupon ordered that its default be entered and that said bill be taken as confessed and true as against the said defendant company.

And now come the parties, by their solicitors, and the demurrer of the Town of Middleport is submitted to the court under stipulation this day filed and upon briefs, and by the court taken under advisement.

Afterwards, to wit, on the 5th day of July, 1887, Judge Blodgett delivered an opinion in said entitled cause, which said opinion is in the words and figures following, to wit:

21 Circuit Court N. D. Illinois. July 5, 1887.

ÆTNA LIFE INS. CO. *v.* TOWN OF MIDDLEPORT and Others.

BLODGETT, J.:

This bill charges, in substance, that at an election of the legal voters of the defendant town held on the eighth day of June, 1867, it was voted "to appropriate the sum of $15,000 to aid in the construction of the Chicago, Danville & Vincennes railroad," such election being held and appropriation made in pursuance of an act of the General Assembly of the State of Illinois approved March 7, 1867, entitled "An act to authorize towns, cities, or townships lying within certain limits to appropriate money and levy a tax to aid in the construction of the Chicago, Danville & Vincennes railroad;" that by said act said legal voters were empowered to bind the defendant town for the payment of the sum so appropriated as soon as said railroad should be laid out and constructed through the said town, and did so bind the town by said vote; that the railroad com-

pany duly accepted the conditions of said appropriation, and laid out, constructed, and completed its track through said town on the faith of such appropriation; that the railroad was so completed on or before the twenty-fourth day of March, 1871, and the appropriation of said aid in the construction thereof became and was due and payable on said day, and that afterwards and on the 24th day of March, 1871, the supervisor and town clerk of the defendant
22 town, for the purpose of paying such appropriation, executed and delivered to said railroad company 15 bonds for the sum of $1,000 each, dated on the last-mentioned day, bearing interest at the rate of 8 per cent. per annum, payable on the first day of June in each year, the principal sum of three of said bonds being payable June 1, 1876; three, June 1, 1877; three, June 1, 1878; four, June 1, 1879, and two, June 1, 1880; and that during the month of June, 1871, the complainant, without notice of any want of power in the town to issue the same, purchased the said 15 bonds from the said railroad company and paid therefor the sum of $14,700, and said bonds were delivered to complainant and complainant has ever since been the holder and owner thereof in good faith for value so paid; that by said purchase and acquirement of said bonds from the railroad company complainant became in all respects the equitable assignee of the sum so appropriated by the town to aid in the construction of said railroad; that after the issue of said bonds and the purchase thereof by complainant the defendant town paid all the interest thereon as the same fell due, according to the tenor of the bonds, up to and including the interest due July 1, 1876; that about the twentieth day of June, 1876, the defendant town filed its bill upon the equity side of the circuit court of Iroquis county, in which county said town is situated, against the complainant, as holders of the bond in question, and divers other persons, whom it is not material here to mention, charging that such bonds were made and delivered without authority of law and were void, and praying
23 the court to so decree and to enjoin complainant from collecting said bonds, and that such proceedings were had in such cause that, on the twelfth day of September, 1876, the supreme court of Illinois adjudged that said bonds were void as issued without authority of law; whereupon said circuit court passed and entered a decree in conformity with the judgment of the supreme court adjudging the bonds void and enjoining the complainant from collecting the same, which judgment and decree has ever since remained and is now in full force.

It is further charged that the adjudication as to the validity of the bonds proceeded solely on the ground of want of power to issue them in payment of the appropriation voted to aid in the construction of said railroad by the voters of the town, but did not hold or adjudge that the appropriation so voted was not valid and binding on the town; that no part of the principal sum of said appropriation has ever been paid by the defendant town, and that by reason of the premises the said appropriation is now due and payable to the complainant as the equitable assignee thereof from said railroad company; wherefore a decree is prayed subrogating the complainant to

all the rights of the railroad company, and directing that the town proceed without delay to levy and collect a tax sufficient to pay such appropriation and that the same be paid to the complainant.

To this bill the defendant town opposes a demurrer on the
24 ground, (1), that the bill is without equity; (2), that it is multifarious; (3), that all right of action was barred by the statute of Illinois in five years from the time appropriation became payable; (4), that the right of action is so barred by the statute of Illinois in 10 years from the time the appropriation became due; (5), that the complainant has been guilty of such laches as to defeat this suit, even if a right of action had ever existed in favor of complainant.

I do not deem it necessary to discuss all the points made on the demurrer, as it seems to me, if the defense of the statute of limitations is good, no other defense need be considered.

The rule is undoubtedly well established in the Federal courts that the defense of the statute of limitations or of laches, if it appears clearly on the face of the bill, may be taken advantage of by demurrer. Judge Story says: "A court of equity will not entertain a suit for relief if it would be barred by law." Story Eq. Pl., § 503; Maxwell *v.* Kennédy, 8 How., 218; Badger *v.* Badger, 2 Wall., 87.

Here complainant seeks to be subrogated to the rights of the railroad company, and, if the rights of the railroad company are barred, then those of the complainant, as equitable assignee, must also be barred. The dealings between the complainant and the railroad company, by which the complainant claims to have become the equitable assignee of the appropriation voted by the town to the railroad company, does not change the nature of the obligation of the town. If it was originally a demand which could only
25 have been enforced by a suit at law, its character in that regard is not so changed as to defeat any legal defense which the town could have against the railroad company. It is emphatically a case where equity will follow the law, because the only ground for equitable cognizance is the alleged equitable transfer to the complainant of the right to this appropriation which entitles the complainant to be subrogated to the rights of the railroad company, and if that right should be decreed, a court of equity, having taken jurisdiction for the purpose of subrogation, may, in its discretion, retain it to do complete justice between the parties.

So much of the act of March 7, 1867, under which this liability was incurred by the defendant town, reads as follows:

"SECTION 1. That all incorporated towns and cities, and towns acting under the township organization law, which lie wholly or partly within twenty miles of the east line of this State, and also between the city of Chicago and the southern boundary of Lawrence county, be, and the same are hereby, severally authorized to appropriate such sum of money as they may deem proper to the Chicago, Danville & Vincennes Railroad Company to aid in the construction of the road of said company to be paid to said company as soon as the track of said road shall have been located and constructed through said city, town or township, respectively: Provided, however, That the prop-

osition to appropriate moneys to said company shall be first submitted to a vote of the legal voters of said respective townships, towns,
26 or cities at a regular annual or special meeting by giving at least ten days' notice thereof, and a vote shall be taken thereon by a ballot at the usual place of election, and if the majority of votes cast shall be in favor of the appropriation, then the same shall be made; otherwise not.

"SEC. 2. The authorities of said townships, towns, or cities, respectively, are hereby authorized and required to levy and collect a tax and make such provisions as may be necessary and proper for the prompt payment of the appropriation under the provisions of this law."

In the case referred to in the bill, where the bonds in question were adjudged void by the supreme court of this State (Middleport *v.* Ætna Life Ins. Co., 82 Ill., 562), the supreme court of Illinois says:

"All these bonds recite upon their face the several acts of the Legislature under which they were issued, and that they were issued in accordance with a vote of the electors of the township at an election on the eighth day of June, 1867. The present holders of the bonds are chargeable, therefore, with notice of the fact whether there was any authority at law for issuing such bonds. Under the decisions of this court, if there was a total want of authority in the municipal officers to issue such bonds, they are void, no matter if they came into the hands of the present holders for full value paid * * * This brings us to the important inquiry, what authority had the officers, assuming to act on behalf of the town of Middleport, to issue the bonds which are the subject of this litigation?
27 Clearly they derive no authority whatever from the act of March, 1867, under which the election as to the propriety of making the appropriation to the railroad company was held. That act did not purport to give either the township or its officers power to borrow money or to issue bonds in payment of any appropriation that might be voted by the legal voters of the town to the railroad company. Such appropriations or donations were to be paid by a tax, which it was made the duty of the corporate authorities to levy and collect. Where one mode of payment of municipal indebtedness is fixed by statute, by implication it excludes all others.

"The electors gave their consent to the statutory mode of paying the appropriation voted, viz., by taxation, and none other, and the corporate authorities of the town were not at liberty to adopt any other mode. * * * The electors of the township under the act of March 7, 1867, had voted a sum of money as an appropriation or donation to the railroad company to be paid by taxation, and in no other way. They never gave their consent to any other mode of payment. * * * Payment of interest for a series of years upon donations voted or discount to make the donations equal to ready money in the market was a burden the people of the township had never assumed, and no power existed anywhere to impose it upon them without their consent."

If I rightly construe this opinion it holds that neither the railroad company nor the complainant acquired any right
28 against the town by the issue of these bonds, and the right of the railroad company to be paid the appropriation is in no way affected by this void act of its officers in issuing these bonds. It follows then, I think, that from the most favorable view which can be taken in favor of the complainant this case must be considered precisely the same as if the railroad company had in the month of June, 1871, assigned to the complainant all its rights to this donation, and it may, for the purposes of this demurrer, be considered that the railroad was then completed through the town so that the appropriation voted was then due and payable, and an action might have been maintained therefor. There was no agreement in writing between the town and the railroad company for the payment of this appropriation. The vote of the electors clothed the proper officers of the town with authority to pay this sum to aid in the construction of this railroad, and made it the duty of the officers of the town to levy and collect a tax sufficient to secure its prompt payment, and as the law made the appropriation payable "as soon as the railroad shall have been located and constructed through the town" it is probable the law would imply a promise on the part of the town to pay when the road was so completed, and the right then accrued to the railroad company to sue for and collect this appropriation, thus clearly bringing the case within the second section of the act of November, 1849, entitled "An act to amend the law concerning the limitation of actions" (Purple, St. Ill., 731), which limits all actions founded upon
29 accounts, bills of exchange, orders, or promises not in writing, express or implied, to five years after the cause of action shall have accrued. There was here no agreement in writing to pay this money; but the voters of the town, acting under the authority of this statute, delegated to their proper officers the authority to pay it, and we may say it became under the law the duty of these officers to levy and collect a tax and pay the money when the road was completed through the town. The time of payment, or whether the sum so appropriated should become due and payable, was wholly uncertain and rested upon the contingency as to when, if ever, the railroad should be so constructed through the town; thus leaving the time when the payment should be due, if it ever became due, to be determined wholly by outside proof. What was done by the voters at their election, although entered upon the town records, does not make a contract in writing with the railroad company or any other person for the payment of this money; but the law may perhaps be said to imply an obligation to pay this money from the vote of the electors and the completion of the road. The voters made and recorded their own will in their own record book, and the law said that this direction of the will of the voters should be carried into effect when the road was completed. It therefore seems to me that the act of the town officers in issuing the bonds cannot be allowed to extend or affect the running of this statute. It must have commenced to run, according to the spirit and teachings of the

30 opinion of the supreme court from which I have quoted, as soon as the railroad company had a right of action against the town, and being only a right of action resting on parol, or which the law would imply from certain acts, and not from an agreement in writing, it must be controlled and limited by the second section of the act of 1849, to which I have referred.

I am therefore of the opinion that any right to which the complainant could be subrogated under this bill is barred by the statute of limitations—that is, if the complainant was by the deree of this court to be placed to-day in the shoes of the railroad company, and to be held to be the assignee of all the right of action of the railroad company, such right of action would be barred by the statute to which I have referred.

The demurrer to the bill is therefore sustained and the bill dismissed for want of equity.

Circuit Court N. D., Illinois.

ÆTNA LIFE INS. CO. *v.* TOWN OF MILFORD.

SAME *v.* TOWN OF BELMONT.

JULY 5, 1887.

BLODGETT, J.:

The suits brought by the same complainant against the town of Milford and the town of Belmont have been submited on demurrers and present precisely the same questions which are presented in the case just considered, and these demurrers will therefore be sustained and the bills dismissed for want of equity.

31 On the same day, to wit, on the fifth day of July, in the July term of said court, 1887, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Decree.

ÆTNA LIFE INSURANCE COMPANY
vs.
TOWN OF MIDDLEPORT *et al.*
} In Chancery.

Now again come the parties, by their solicitors, and the court, having considered the demurrer of the town of Middleport to the bill herein, sustains the same. It is thereupon ordered and adjudged that said bill be dismissed for want of equity at complainant's costs and that execution issue therefor.

32 Afterwards, to wit, on the seventh day of July, 1887, came the complainant, by its solicitors, and filed in said clerk's office its motion for appeal in said entitled cause, which said motion for appeal is in the words and figures following, to wit:

Motion for Appeal.

In the Circuit Court of the United States, Northern District of Illinois. July Term, A. D. 1887.

THE ÆTNA LIFE INSURANCE COMPANY, Complainant,
vs.
THE TOWN OF MIDDLEPORT *et al.*, Defendants.

Bill in equity.

Now comes said complainant and prays said court for an appeal from its final order and decree of July 5th, 1887, sustaining the demurrer of said town to said bill and dismissing said case, and asks the court for sixty days or such reasonable time as the court may allow within which to present its appeal bond herein in such appeal to the Supreme Court of the United States.

BAILEY & SEDGWICK,
Complainant's Solicitors.

Endorsed: Filed July 7, 1877. Wm. H. Bradley, clerk.

33 On the same day, to wit, on the seventh day of July, in the July term of said court, 1887, in the record of proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

ÆTNA LIFE INSURANCE COMPANY
vs.
TOWN OF MIDDLEPORT *et al.* } In Chancery.

Now comes the complainant, by its solicitor, and prays an appeal from the decree of dismissal herein to the Supreme Court of the United States, which is allowed on said complainants giving bond, according to law, in the penal sum of five hundred dollars, with surety, to be approved by the clerk.

34 Afterwards, to wit, on the twenty-second day of July, 1887, there was filed in said clerk's office an appeal bond in said entitled cause, which said appeal bond is in the words and figures following, to wit:

Appeal Bond.

Know all men by these presents that the Ætna Life Insurance Company, of Hartford, Connecticut, and Bailey & Sedgwick (O. J. Bailey & J. H. Sedgwick) are held and firmly bound in the penal sum of five hundred dollars, good and lawful money of the United States, to the town of Middleport, in the county of Iroquois and State of Illinois, and the Chicago, Danville & Vincennes Railroad Company, their successors, assigns, and legal representatives, for the payment of which well and truly to be made, said obligors hereby bind

themselves, their heirs, executors, administrators, and successors, jointly, severally, and firmly by these presents.

Witness the hands and seals of said obligors this 18th day of July, A. D. 1887.

The condition of this obligation is such that whereas in the circuit court of the United States for the northern district of Illinois, at the July, 1887, term thereof, to wit, July 5th, 1887, said obligees obtained a judgment and decree against said obligor, The Ætna
35 Life Insurance Company in a certain case in equity then and therein pending, in which said obligor was complainant and said obligees defendants, upon demurrer by said town to said complainant's bill therein, sustaining said demurrer and dismissing said bill of complaint, at complainant's costs, from which judgment and decree said complainant has taken an appeal to the Supreme Court of the United States, now if said appellant shall prosecute its said appeal to effect, or if it fail to make its plea good, shall answer all damages and costs therein, then this obligation to be void; otherwise to remain in full force and effect.

[SEAL.] JOHN C. WEBSTER, [SEAL.]
Vice-President.
JAS. H. SEDGWICK, *Surety.* [SEAL.]
O. J. BAILEY, *Surety.* [SEAL.]

Approved:
WM. H. BRADLEY, *Clerk.*

Endorsed: Filed July 22d, 1887. Wm. H. Bradley, clerk.

36 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein The Ætna Life Insurance Company is the complainant and The Town of Middleport and The Chicago, Danville and Vincennes Railroad Company are the defendants, as the same appear from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office, in Chicago, in said district, this twelfth day of September, 1887.

[Seal of Circuit Court U. S., Northern Dist. Illinois. 1855.]

WM. H. BRADLEY, *Clerk.*

Endorsed on cover: N. Illinois, C. C. U. S. No. 1134. The Ætna Life Insurance Company of Hartford, Connecticut, appellant, *vs.* The Town of Middleport. Filed October 8, 1887.